

UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF CALIFORNIA

In re: ) Case No. 03-23527-D-13L  
DANIEL and MERCY KELLENBECK, )  
Debtors. )  
\_\_\_\_\_)  
DANIEL and MERCY KELLENBECK, ) Adv. Proc. No. 05-2523  
Plaintiffs, )  
v. )  
UNION PLANTERS BANK / )  
INDIVIDUALIZED BANKCARD )  
SERVICES, ) Date: May 16, 2006  
Defendant. ) Time: 1:00 p.m.  
\_\_\_\_\_)

MEMORANDUM DECISION

I. INTRODUCTION

MBNA American Bank, N.A. (the "Bank") has motioned the court to vacate the entry of default against it (the "Motion") in an adversary proceeding filed by Daniel Kellenbeck and Mercy Kellenbeck (the "Debtors") to recover a preference. For the reasons set forth below, the court will grant the Motion.

II. BACKGROUND

The Debtors filed a joint Chapter 13 petition on April 1, 2003. On June 6, 2003 attorney for the Debtors sent a letter to

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1 the Bank asserting a preferential payment and demanding a return of  
2 certain funds. The letter is addressed to "Agent for Service for  
3 Union Planters Bank, P.O. Box 15137, Wilmington, DE 19886-5137"  
4 (the "P.O. Box Address"). The Bank did not respond to the June 6,  
5 2003 letter. Attorney for the Debtors then sent a second letter to  
6 the Bank on July 25, 2005, again asserting a preferential payment  
7 and demanding return of certain funds. This second letter gave the  
8 ultimatum, that if no response was received within fifteen days,  
9 the Debtors would file a complaint seeking recovery of the alleged  
10 preference. The July 25, 2003 letter was also sent to the P.O. Box  
11 Address. The Bank did not respond to the July 25, 2005 letter.

12 On December 21, 2005 the Debtors filed a complaint for  
13 recovery of preferential transfer (the "Preference Action"). On  
14 December 27, 2005 the Debtors served the Preference Action and  
15 summons on the Bank by regular mail at the P.O. Box Address. As of  
16 March 3, 2006 the Bank had not filed an answer, or other responsive  
17 pleading to the Preference Action and the Debtors requested entry  
18 of default. Default was entered against the Bank by Clerk of the  
19 Bankruptcy Court on March 8, 2006. On April 9, 2006 the Bank filed  
20 the Motion.

21 In support of the Motion the Bank filed the declaration of  
22 Kenneth Holton, an assistant vice president of the Bank, and  
23 custodian of records (the "Holton Declaration"). The Holton  
24 Declaration states as follows: (1) that the Bank's records do not  
25 show that it received the Preference Action and summons at any time  
26 before April 7, 2006; and (2) the P.O. Box Address is a payment  
27 processing address for the Bank.

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1 The Motion asserts that it has a meritorious defense to the  
2 Preference Action. Specially, the Motion asserts a statute of  
3 limitations defense. It appears, the Bank may well have a  
4 meritorious defense to the Preference Action.

### 5 III. ANALYSIS

6 Federal Rule of Bankruptcy Procedure 7004(b) provides "service  
7 may be made within the United States by first class mail postage  
8 prepaid . . . upon a domestic or foreign corporation or upon a  
9 partnership or other incorporated association, by mailing a copy of  
10 the summons and complaint to the attention of an officer, a  
11 managing or general agent."<sup>1</sup> An elementary and fundamental  
12 requirement of due process in any proceeding which is to be  
13 accorded finality is notice reasonably calculated, under all the  
14 circumstances, to apprise interested parties of the pendency of the  
15 action and afford them an opportunity to present their objections.  
16 Mullane v. Central Hanover Bank, 339 U.S.C. 306, 70 S.Ct. 652.

17 Entry of Default may be set aside for good cause shown. Fed.  
18 R. Civ. P. 55(c). Where timely relief is sought from a default  
19 judgment and the movant has a meritorious defense, doubt, if any,  
20 should be resolved in favor of the motion to set aside the  
21 judgment. Schwab v. Bullocks, Inc., 508 F.2d 353, 355 (9<sup>th</sup> Cir.  
22 1974). The "good cause" standard for setting aside an entry of  
23 default alone, not a default judgment, is slightly more favorable  
24 to the party in default. See Hawaiian Carpenters Trust Fund v.  
25 Stone, 794 F.2d 508, 513 (9<sup>th</sup> Cir. 1986). A district court's  
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28 <sup>1</sup> F.R.B.P. 7004 makes applicable Federal Rule of Civil  
Procedure 4.

1 discretion is especially broad when it is entry of a default that  
2 is being set aside, rather than default judgment. See Brady v.  
3 United States, 211 F.3d 499 (9<sup>th</sup> Cir. 2000).

4 At the outset it is noted, the Bank's failure to respond to  
5 the June 6, 2003 and the July 25, 2005 letters, should have made  
6 counsel question whether the letters were, in fact, being received  
7 by an officer or managing agent of the Bank. The Bank has  
8 submitted uncontroverted evidence that the Debtors served the  
9 Preference Action and summons at a post office box that the Bank  
10 used for processing payments. Further, the Bank has submitted  
11 uncontroverted evidence that it does not have record of ever  
12 receiving the Preference Action until March 9, 2006 which was after  
13 entry of the default.

14 The court finds service by mail of a summons and complaint to  
15 a post office box address, which an entity uses for the processing  
16 of payments, does not meet the standard set forth in Mullane. It  
17 cannot be said that service at an address used for processing of  
18 payments, is reasonably calculated, under all the circumstances, to  
19 apprise interested parties of the pendency of the action. If, when  
20 serving a complaint pursuant to F.R.B.P. 7004, a party does nothing  
21 more than use the address off a billing statement, an address where  
22 payments are to be sent, the plaintiff assumes the exact type of  
23 risk that has surfaced in this case. Specifically, that service  
24 will be inadequate, and any relief afforded by default is subject  
25 to being set aside for faulty service.<sup>2</sup>

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27 <sup>2</sup> With today's technology, it is easy enough to find the  
28 service address of record, or the agent for service of process,  
for most any business entity.

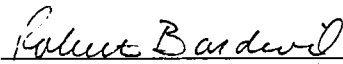
1 After entry of the default against it the Bank acted promptly  
2 in filing the Motion and requesting that the default be set aside.  
3 The Bank has also presented a prima facie meritorious defense to  
4 the Preference Action, that being the two-year statute of  
5 limitation imposed by 11 U.S.C. § 546(a).

6 IV. CONCLUSION

7 For the reasons stated above, the court finds that good cause  
8 exists for setting aside the default and the court will issue an  
9 order accordingly.

10 Dated:

11 MAY 17 2006

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13 ROBERT S. BARDWIL  
14 United States Bankruptcy Judge  
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UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF CALIFORNIA  
CERTIFICATE OF MAILING

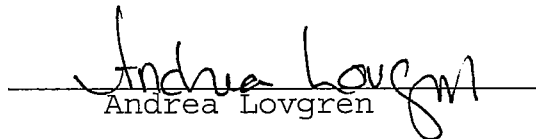
The undersigned deputy clerk in the office of the United States Bankruptcy Court for the Eastern District of California hereby certifies that a copy of the document to which this certificate is attached was mailed today to the following entities listed at the address shown on the attached list or shown below.

Office of the U.S. Trustee  
501 "I" Street, Room 7-500  
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John O'Donnell  
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Sacramento, CA 95825

Mary Ellen Terranella  
1652 W. Texas Street, Suite 222  
Fairfield, CA 94533

Dated: MAY 17 2006

  
Andrea Lovgren